No. 12510

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

LANE SUMMERS,
CHARLES B. HOWARD,
SUMMERS, BUCEY & HOWARD,
Proctors for Appellee.

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Seattle 4, Washington.

FRAYN PRINTING COMPANY

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I.

STATEMENT OF THE CASE

A. FACTS

In February, 1946, a shipment of 10,500 bags of wheat flour was loaded aboard the S.S. "Sweepstakes" at New York consigned to Appellee at Rio de Janeiro, Brazil. The vessel, owned by Appellant, and operated by Moore-McCormack Lines as agent, proceeded via Trinidad to Rio de Janeiro, Brazil, where it arrived on February 19, 1946 (Aps. 160).

The trial court found as a fact that this shipment of flour was received aboard the vessel at New York in apparent and actual good order and condition. Appellant does not assign error as to this finding—hence no question of "delivery in good order" to the ship is involved.

After arrival of the vessel in Rio de Janeiro, the shipment of flour was, by special arrangement, discharged directly into rail cars, rather than passing through the Brazilian Customs warehouse as normally would be true (Aps. 218-19). This was done due to the priority nature of the shipment (Aps. 185).

Several witnesses, including the master of the ship, a custom's checker and Appellant's own claim agent testified that no inspection of the flour was made by anyone at the exact moment of discharge, other than a tally of the number of bags landed from the vessel (Aps. 54, 58, 61, 162, 185, 220). As the rail cars were loaded, they were moved to consignee's mill, a distance of 1800 meters, or just over one mile, from the discharging dock. During this movement, the rail cars were securely covered by tarpaulins.

Discharging commenced on February 21, 1946, and was completed on February 25, 1946, according to the ship's log (Aps. 160). The flour arrived at the

mill and was inspected by representatives and employees of the Appellee-consignee, between February 22 and March 1, 1946. Reference to a calendar will indicate that a week-end intervened during this period.

Upon arrival and inspection of the flour at consignee's mill it was noted that a considerable quantity of the flour was damaged by wetting. 3087 bags of damaged flour were segregated (Aps. 119). Notice of the damage to the shipment was sent to Appellant's agent by Appellee's letter of March 2, 1946 (Aps. 64). Appellant's agent answered by letter of March 9 (Aps. 65) denying liability for the damage.

Appellee called for a survey of the damaged flour, which was conducted by an independent surveyor between March 6 and March 8, 1946 (Aps. 68). This surveyor called in an industrial chemist who took samples of the damaged flour and bagging material (Aps. 89, 91-2). After making chemical analyses of the samples, by recognized testing procedures, both quantitatively and qualitatively (Aps. 93), the chemist rendered his report giving his finding as to presence of sodium and chloride in abnormal amounts, forming the basis for his expressed opinion that the flour had been damaged by contact with salt water (Aps. 89, 94-5).

Thereafter, both the chemist and the surveyor arrived at a figure of 35% damage to the 3087 bags

of flour found to have been contaminated by salt water (Aps. 71, 90); however, the percentage of damage was finally agreed to be 40% because consignee's representatives protested the lower 35% figure (Aps. 75).

The amount claimed by the Appellee as libelant in this action was $7,368.67 U. S. funds, based on 35% damage only, to 3087 bags of flour with a market value at destination of 137 cruzeiros, Brazilian funds, per bag. At the then prevailing rate of foreign exchange, the market value of each bag of flour would have been $6.82 in U. S. funds.

Because of the trial court's ruling as to interrogatories, wherein it was stated that the market value per bag at Rio de Janeiro was only 126 cruzeiros, rather than 137 cruzeiros, as later testified by witnesses in depositions, Appellee stipulated in open court to allow the lower figure of 126 cruzeiros per bag to stand as the proved value (Aps. 128) and Appellant's proctor then *admitted* in open court that the market value was 126 cruzeiros per bag (Aps. 132).

The findings and decree of the trial court allowed 35% depreciation on 3087 bags of flour at a value of 126 cruzeiros or $6.27 U. S. funds per bag, making a total recovery for Appellee against Appellant of $6,774.42 U. S. funds, plus interest and costs (Aps. 29-33).

B. QUESTIONS INVOLVED

In addition to the questions set forth in Appellant's brief, the question of burden of proof is involved, as follows:

Where there is no issue as to delivery of cargo to the ship in good order and condition, and delivery or receipt by the consignee at destination in bad order which damage is proved, is the consignee (Appellee) entitled to a decree against the carrier (Appellant) for its damage, in the absence of a showing by the carrier that the bad order or damage was due to some cause for which the carrier would not be liable under the contract of carriage and applicable law?

This question is raised by Appellant's Answer and affirmative defenses, was argued during the trial and is suggested in Appellant's brief (p. 27). The trial court held in effect that since delivery in good order and receipt at destination in bad order were proved, and the cause of the damage was proved to be sea water without proof of any fact to explain the cause of the damage, the consignee-Appellee was entitled to a decree for its proved damages (Aps. 356-7).

We contend that the evidence amply supports the findings referred to above.

II.

ANSWER TO ARGUMENT OF APPELLANT

A. PROOF THAT FLOUR WAS WET FROM SEA WATER AT DESTINATION

Appellant seems to premise its argument on the supposition that owners of cargo will be present on the dock at the exact moment that the cargo is discharged to determine whether their cargo has sustained damage during carriage aboard a vessel. Obviously that is not so, and would not only be impracticable but unreasonable. It has been recognized as such by this court in the converse situation of inspection at the time of loading of cargo.

> "While Appellee did not show examination and inspection of all barrels *at the very moment of loading,* we think to require such proof would have been unreasonable and impractical." (Italics added for emphasis)
>
> *Apex Fish Co. v. U. S. A.* (CA, 9) 177 F. (2d) 364, 1949 A.M.C. 1704, 1710.

To the same effect as to inspection at time of discharge, see *The Astri* (CA, 2) 151 F.(2d) 5, 1945 A.M.C. 1064, 1068, 1069.

This is particularly true in the case of salt water, or sea water damage, where our courts have for many years recognized that the burden is upon the carrier to explain the cause of such damage.

In a case of salt water damage to cargo from an undetermined source or cause, this Court in a de-

cision rendered in 1910 held that the burden was upon the carrier to prove the cause or origin of the salt water to be within one of the excepted causes under the bill of lading contract. *The Medea* (CA, 9) 179 Fed. 781. This Court quoted at length from the decision of the U. S. Supreme Court in *The Folmina,* 212 U.S. 354, 362, 29 S. Ct. 363, 365, 53 L. Ed. 546 on this point as follows:

> "Where showing an injury by sea water does not in and of itself operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils."
>
> "The inability of the court below to determine the course of the entrance of the sea water would imply that the evidence did not disclose in any manner how the sea water came into the ship. In other words, while there was a certainty from the proof of a damage by sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the sea water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance

of the sea water must be resolved against the carrier."

The Medea (CA, 9), 179 Fed. 781, 791.

Even where the damage to cargo has been found by survey or analysis to be fresh water, rather than salt water, it has been held that under the Carriage of Goods By Sea Act, 46 U.S.C.A. §1300, 1303(2) the burden is upon the carrier to account for the damage to cargo. *The Ciano* (E.D. Pa.) 69 Fed. Supp. 35. In that case, as in the present case, the respondent carrier sought to prove that the damage could not have occurred while the cargo was aboard the vessel. In fact, the court found that "the preponderance of the evidence eliminates certain possible causes of damage, as condensation and ship's sweat." *The Ciano,* 69 Fed. Supp. 35, 40. Nevertheless, the court went on to hold:

> "The libelant's *prima facie* case of receipt on the "Ciano" in good condition must stand. The cargo was delivered in bad condition. The respondents have failed to show either that the damage did not occur aboard the vessel, or that however it occurred, it was not due to or contributed to by, the fault of the carrier, its agents or servants. Accordingly the libelant is entitled to recover herein."

The Ciano (E.D. Pa.) 69 Fed. Supp. 35, 40.

Appellant insists, however, that the lapse of time between actual discharge of the flour from the vessel, and its movement by rail a distance of a little over a mile to consignee's warehouse, before dam-

age was discovered or reported, leaves a "gap" which shifts the burden of proof as to the exact cause of the damage onto Appellee, the consignee. We find no authorities whatsoever cited in Appellee's brief to support this contention. Even if this contention were accepted as correct, we submit that Appellee has proved by ample, uncontradicted testimony that no salt water damage could have been sustained to the flour after discharge and while en route the short distance of one mile to Appellee's mill.

Thus checker Luiz, not an employee of Appellee, testified that the rail cars containing the flour were covered with canvas, in good condition, and well tied, as soon as loaded and "no rain could possibly damage the goods covered" (Aps. 55). Also, witness Luiz testified that it was doubtful whether any rail car remained on the dock more than two hours after loading (Aps. 56). On several occasions witness Luiz stated that the shipment was not exposed to rain (Aps. 55, 56, 58).

Other testimony established that the building where the flour was received and stored at Appellee's mill, before inspection and discovery of the damage, was designed for storage of flour, was of concrete construction, with ground floor one meter above the ground, and "no leakage or dampness was present at any time" (Aps. 100-1).

Appellant would have this court believe that the flour in this shipment, weighing 55,566 pounds by Appellant's own calculation and requiring "an immense quantity of water to saturate" (Br. 56) by Appellant's own statement, was damaged by salty tarpaulins, rain, spray from the seaside, or salt remaining in the rail cars from previous loads (Br. 30), although no testimony whatsoever was offered by Appellant to support such suggestions. Yet Appellant admits that "some unique disaster" might have caused a leak in the vessel, causing damage to the flour while still aboard (Br. 36).

But mere speculation, or a theory unsupported by evidence, is not enough to relieve Appellant as carrier from liability where damage by salt water has been proved. In *The Lassell* (EDNY) 53 F.(2d) 687, 1925 A.M.C. 1066, a shipment of raw linseed in bags was found upon discharge to have been damaged by salt water. The court said:

> "There is, however, no evidence before me on which I can do more than guess at the cause that permitted the sea water to enter * * *
>
> "I am compelled therefore to find that the claimant has not sustained the burden of proof as to the defenses asserted by it, and as libelant has made out a *prima facie* case, it seems to me it is entitled to recover."
>
> *The Lassell* (EDNY) 53 F.(2d) 687, 688, 1925 A.M.C. 1066.

Certainly, speculation by Appellant in its brief as to the cause of damage to flour proved to have been

due to salt water contamination cannot stand as a substitute for facts that it is required to prove to relieve itself from liability.

Appellant's brief dwells upon the contention that no notation of damage was made in Customs house records at Rio de Janeiro, and that the court must accept this incident as satisfactory proof that no damage in fact existed at time of discharge (Br. 19). The plain and simple answer to this is that both the carrier's and the consignee's witnesses testified without contradiction that this particular shipment of flour did not pass through the Brazilian Customs Warehouse where such inspections *for damage* would ordinarily be made. Checker Luiz stated that "no one" checked this cargo *for damage* at time of discharge (Aps. 54, 58, 64). The only check was a tally as to quantity (Aps. 54). Captain Lane testified that the flour was priority cargo and was "taken directly to the customers *without weighing or inspection*" (Aps. 185). Chief Officer Parsons stated that he checked the hatches at time of discharge for condensation and "the only thing I looked for was any possibility of sweat" (Aps. 195). Appellant's Claim Agent at Rio de Janeiro, Mr. Caswell, testified that "no detailed inspection was made" at the time the flour was discharged at Rio de Janeiro (Aps. 220).

Lawyer de Camargo's testimony as to his knowl-

edge of the usual practice of inspection by Brazilian Customs officials for damage and the entry of notations of damage on Custom's registers is rendered unimportant because of the special circumstances mentioned above and the admission of Lawyer de Camargo that he had no personal knowledge of what was *actually done* on this particular shipment with regard to inspection for damage (Aps. 328, 331). Furthermore, Lawyer de Camargo admitted that it was "possible" that Brazilian Customs officials did not inspect this shipment of flour upon discharge for damage (Aps. 330).

Appellant attempts to escape liability by showing that no water was found in the deep tanks of the vessel, that pipe lines in the holds were not defective, that there was no sweat damage, no leakage through ventilators, hatches, hatch covers or tarpaulins on the vessel, and that the decks and sides of the ship were welded and not riveted and hence did not leak (Br. 20-22).

The inadequacy of such proof is illustrated by the remarks of the court in a similar case, involving salt water damage to bales of kid skins received aboard a vessel in good condition and found upon discharge to be in a "wet and stained condition." The court said:

> "Respondent carrier contends that it should be exonerated from liability by reason of the

proof offered:—that the vessel was new, that it was on its second voyage only, that the shipment was stowed in the safest and driest place aboard for cargo of the kind, namely No. 5 hold 'tween deck, that during the voyage from Massawa to New York no sea or salt water entered the hold, and that upon completion of the voyage, an inspection of the hold at the time of unloading revealed no water in the hold and no dampness, outside of stains on the deck or floor as if made by approximately 9 bales. * * *

"The shipment having been received aboard in good condition, the carrier was bound to discharge it in the same condition, unless it was excused by reason of some provision in the Carriage of Goods by Sea Act, 46 U.S. Code Sec. 1300 *et seq.* There is no evidence in this case sufficient to excuse or exonerate the carrier."

George A. Pickett (SDNY) 77 Fed. Supp. 988; 1948 A.M.C. 453.

See also:

The Ciano (E.D. Pa.) 69 Fed. Supp. 35 and *The Medea* (CA, 9) 179 Fed. 781.

Similarly, the proof of features and characteristics of the S.S. "Sweepstakes" and of the apparent absence of any discernible defect in the ship, cannot avail the Appellant in this case to exonerate it from liability for damage which Appellee has affirmatively proved to have been caused by *salt water contamination* of the flour.

Appellant next seeks to destroy Appellee's *prima facie* case by attacking the adequacy and reliability of the surveyor's report and the chemist's re-

port, Libelant's Exhibit 4 (Aps. 90), which formed the basis for Appellee's proof of salt water damage to the flour (Br. 27-30).

Significantly, with respect to the report and testimony of Dr. Barreto, this chemist, the trial court stated in its oral decision at the close of the trial, as follows:

> "The court has no doubt of the correctness of the fact as to the nature of the damage as found by libelant's witness, Dr. Barreto. Everything connected with his deposition points to unquestioned credibility of his testimony, and I see no fact or proper inference of fact which to my mind would tend to dispute or undermine the truthfulness of his statements as to cause of damage." (Aps. 356)

Dr. Barreto testified to eminent professional qualifications by education, experience and present employment (Aps. 83). He described tests and procedures used by him in making the analyses of samples of flour (Aps. 85-93) which were recognized by even Appellant's expert witness, chemist Punett, as proper and sufficient tests to determine whether the flour had been contaminated by contact with salt water (Aps. 304). Chemist Punett admitted that Dr. Barreto was "a qualified chemist" (Aps. 303). The other chemist called by Appellant likewise conceded that the findings of Dr. Barreto, based on the tests which he performed, would be reliable (Aps. 255).

Appellant bases its attack and attempted impeachment of Dr. Barreto on the fact that his written report to the surveyor (Aps. 90) indicated that qualitative tests—for quality only—were made on samples of the flour, whereas Appellant's chemist testified that it would also be necessary to make quantitative tests—for percentage of chemical constituents—to accurately determine whether damage to the flour by wetting was in fact salt water contamination or whether it was fresh water or other moisture damage. Here again, Appellant emphasizes the failure to record the results of qualitative tests. But the clear and repeated testimony of Dr. Barreto is to the effect that he *did make a quantitative as well as a qualitative* analysis of the flour samples (Aps. 93). He also made comparative tests between salt-water-contaminated flour and flour intentionally contaminated with fresh water, as well as good marketable flour (Aps. 87, 93). All of his procedures, tests and findings used on these samples were checked, confirmed and found to be accurate and reliable by chemist Owens at Seattle, who testified for Appellee (Aps. 350). Chemist Owens, employed by Laucks Laboratories, testified to a long-standing experience and frequent testing of flour and cereal samples and stated unequivocally that he did not even consider that a quantitative analysis was necessary to determine salt water contam-

ination of flour, being of the opinion that qualitative tests used by Dr. Barreto were reliable in making such a determination (Aps. 334, 349-51).

The same type of qualitative report on a silver nitrate test for salt water damage, which is criticized by Appellant herein, was considered by the Court of Appeals for the Second Circuit in an admirality case involving a shipment of cocoa beans claimed to have been damaged by salt water while being shipped from a Brazilian port to New York. In approving the report as adequate, the court said:

> "By the conventional silver nitrate test, he (the surveyor) concluded that salt water had contributed to the damage. Broken down, the reactions to his tests were: '1 heavy salt, 4 salt, 5 light salt, 2 trace and 2 nil.' * * * Furthermore, Elliott's findings were to some extent corroborated by the results of Lynner's tests, since out of 24 samples tested by him, half showed a slight chloride reaction. We think that there was sufficient evidence to permit the district court to find that the presence of sea water, by increasing amount of moisture which condensed in the holds, contributed to the damage."
>
> *The Asturias* (CA, 2) 126 F.(2d) 999, 1942 A.M.C. 360.

It will be noted that the same terminology was used in the surveyor's report in the above case as in Dr. Barreto's report in the present case.

B. WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE (PROOF THAT FLOUR WAS WET FROM SEA WATER AT DESTINATION)

Appellant acknowledges that the trial court has "wide discretion in determining the scope of [such] indirect evidence" (Br. 33). Yet Appellant claims on this appeal that the trial court committed error in rejecting indirect proof of this type which was offered on behalf of the carrier (Br. 32). The trial court repeatedly invited counsel for Appellant to cite authorities in support of the offer of such testimony, but none were furnished during the trial, and none are contained in Appellant's brief on this appeal (Aps. 141, 143, 146, 178; Br. 32-38). Appellee did offer the trial court authorities to support its objection (Aps. 140).

In exercising the "wide discretion" which Appellant concedes is possessed by the trial court, the District Judge indicated the sound reasoning upon which its ruling excluding the evidence was based as follows:

> "The vessel might have been ever so staunch, strong and tight on the voyage which immediately preceded arrival at the port where she took on the cargo in question, but within a mile of such port arrival she might have run on rocks and sprung some leaks. Anything like that is in the realm of possibility, and it seems to me it is not proof. It is a question of what

> was her condition at the time of her loading this cargo and thereafter." (Aps. 145, 146)

The same attitude by the trial court toward such evidence was expressed in *The Ensley City* (D.C. Md.) 71 Fed. Supp. 444, 1947 A.M.C. 568; Aff'd. (CA, 2) 170 F.(2d) 25, 1948 A.M.C. 1589. This was an admiralty action brought against the water carrier to recover damages to a cargo of licorice extract. The trial court excluded from evidence certain temperature records recorded in the holds of the vessel on a prior voyage, which the carrier sought to introduce to dispute the claim of the cargo owner of damage by excessive heat. The court held that substantially similar conditions had not been shown to have existed on the different voyages and that too many other factors might affect the temperature readings, and hence the records of temperatures on other voyages were excluded as having little or no "probative weight." The decision of the trial court was affirmed on appeal.

The general rule on this subject is stated in 32 C.J.S. under EVIDENCE, §583, as follows:

> "In the absence of a showing that the essential conditions were the same, an issue as to the existence or occurrence of a particular fact, condition, or event, cannot be proved by evidence as to the existence or occurrence of other facts, conditions or events although they may be, in some respects, similar."
>
> 32 C.J.S., EVIDENCE, §583, p. 438.

In *The Richelieu* (CA, 4) 48 F.(2d) 497, 1931 A.M.C. 721, an admiralty action involving a pitch dust explosion and fire aboard a ship, while loading a cargo of pitch, the respondent sought to show that it had loaded other products in previous years under the same conditions without mishap. The appellate court held that such evidence was not admissible and said:

> "And the fact that no explosion resulted in the loading of the coal is not conclusive that the methods employed were such as in the exercise of due care should have been used even there."
>
> *The Richelieu* (CA, 4) 48 F.(2d) 497, 1931 A.M.C. 721.

We submit that the type of testimony offered by Appellant as to conditions and cargoes of other commodities carried on prior and subsequent voyages of the "Sweepstakes" was properly excluded by the trial court under the above authorities. It was also properly excluded from the case in the exercise of the "wide discretion" which even Appellant concedes the trial court possesses on such matters. Consequently, Appellant cannot persuasively argue that it was prejudiced by these rulings of the trial court excluding such evidence.

C. NOTICE OF SURVEY

Appellant contends that Appellee, as libelant, failed to give the carrier's agent at Rio de Janeiro

proper notice of the damage and afford an opportunity to the carrier's representatives to survey, test or sample the damaged flour. The finding of the trial court to the contrary is assigned as error by Appellant on this appeal (Br. 38).

The uncontradicted facts are that the following letter was sent by Appellee to Appellant's agent at Rio de Janeiro on March 2, 1946, which letter is in evidence as Libelant's Exhibit 3 (Aps. 19). A translation of this letter from Portuguese into English was read into the record by stipulation of proctors (Aps. 63) and is as follows:

> "* * * letter of March 2, 1949, from Companhia Luz Stearica, Sec. Moinho da Luz, Rio de Janeiro, Brazil, to Moore-McCormack, S.A., at a street address in Rio de Janeiro.
>
> " 'Gentlemen: Ref.: 10,500 sacks with 252,000 kilos of flour shipped in New York on the steamship "Sweepstakes," corresponding to bills of lading dated 1/31/36. Having noted a certain number of torn sacks with loss of contents, and as many more wet, on the unloading of the flour under reference, we are advising you that we hold the steamer's owners responsible, as transporters, for the averages above mentioned.
>
> " 'There being nothing further, we are, Yours respectfully, Companhia Luz Stearica, Sec. Moinho da Luz' by a director." (Aps. 64)

Appellant's agent at Rio de Janeiro replied to the above notice on March 9, 1946, and this letter is in evidence as a part of Libelant's Exhibit 3 (Aps. 63) and a translation from Portuguese into English,

agreed upon by proctors was read into the record (Aps. 64) as follows:

> "* * * Moore-McCormack's letterhead, at Rio de Janeiro, dated March 9, 1946, to Messrs. Moinho da Luz, Cia Luz Stearica, at Rio de Janeiro.
>
> " 'Ref.: S.S. 'Sweepstakes,' V-12S 10,500 sacks of flour. Gentlemen: In reply to your favor of the 2nd inst., we must inform you that according to the registers of defects and averages of the Wharf Warehouse, the packages above were unloaded in perfect condition, the which exempts us from any responsibility.
>
> " 'There being nothing further, we are, Yours sincerely, Moore-McCormack (Navagacao) S/A., Representative of the Moore-McCormack Lines, Inc., agent of the "War Shipping Administration" of the U.S.A., By: A. M. Caswell, Dept. Defects and Averages'." (Aps. 64-65)

A reading of these two letters would seem to furnish a complete answer to Appellant's claim that no notice of claimed damage or opportunity to survey and test the flour was given to the carrier's representative at Rio de Janeiro. Certainly the consignee is not under an obligation to insist upon an examination and survey being made by the carrier's representatives. Having sent prompt written notice to the carrier and having received a reply from its agent prior to the completion of the tests and survey, it would seem that the Appellant was entitled to accept the carrier's denial of liability as sufficient.

Appellant's claim agent, Mr. Caswell, testified

that Appellant did not request an opportunity to inspect the flour *after receipt of notice* of the damage claim (Aps. 230). He further testified that Appellant was not denied an opportunity to inspect the damaged flour (Aps. 230).

How can Appellant now claim that it was prejudiced by lack of opportunity to inspect and test the damaged flour under the above circumstances?

In *The Caledonier* (SDNY) 60 F.(2d) 562, 1932 A.M.C. 954, the carrier made a similar claim that it received no notice of the survey of damaged cargo. In disposing of this contention the court said:

> "As for the objection that the respondent received no notice of a survey, there was no survey in the sense that a vessel is surveyed. All that libelants did was to have an expert make an examination of the goods and give estimates. *They gave the respondent an opportunity to make an inspection.* This exception is wholly without merit." (Italics added for emphasis)
>
> *The Caledonier* (SDNY) 60 F.(2d) 562, 563, 1932 A.M.C. 954.

D. EXTENT OF DAMAGE

Appellant's assigned errors as to damage fall within the following categories:

1. That there was insufficient proof of damage to the extent of 35% of sound market value.
2. That there was insufficient proof as to no salvage obtained or obtainable on the damaged flour. (Br. 40-46)

In urging the above assigned errors, Appellant seeks to discount the testimony of surveyor Ramos and Dr. Barreto, suggesting, among other things, that surveyor Ramos was not experienced or qualified, and did not make adequate tests to determine the extent of damage to the flour.

The record shows, however, that Ramos was an *independent* surveyor, employed by Companhia Immobiliaria Financiera Americana (Aps. 66), and not employed by Appellee. He testified to ten years' employment by the same company in the same capacity and stated that his experience was practical (Aps. 67).

Surveyor Ramos made two inspections of the flour shipment on separate days (Aps. 68). He testified fully and in detail as to the nature and type of damage found in the bags of flour (Aps. 69, 75). He readily admitted that no pattern or system could be noted (Aps. 76).

Surveyor Ramos testified that the damaged bags of flour were segregated in fifteen separate piles and counted. Samples were taken at random from six of the damaged bags of flour (Aps. 69), and these samples were not only of the bag material and hardened crust near the surface but also of the flour contents to a depth of five centimeters (Aps. 76).

Although Appellant protests the finding of 35%

damage, based on the Ramos survey and Barreto analyses, it is interesting to note that this percentage is *less* than the percentage of damage finally agreed to between the surveyor and Appellee, namely, 40% (Aps. 75). The various factors, such as percentage of actual damage, additional labor required and cost of new flour bags, which were considered by Ramos in making his estimate were fully covered by Appellant's own interrogatories to this witness and his candid answers thereto (Aps. 81-82).

Proving the extent of damage by the above type of testimony has been sanctioned and approved in similar admiralty cargo damage cases. *The Caledonier* (SDNY) 60 F.(2d) 562, cited by Appellant on this point (Br. 45) demonstrates the sufficiency of such proof by surveyor's estimate. In that case the trial court was called upon to settle a Commissioner's report as to damage to bales of skin. The court said in part:

> "The second exception is that the commissioner based his findings on a rough estimate made at an *ex parte* survey of which the respondent received no notice. In my opinion the evidence before the commissioner was adequate to support his finding as to the amount of damage done to the cargoes. The examination made by Baker was sufficiently thorough. He was skilled in the work, and it would be unreasonable to expect him to examine every skin."

The Caledonier, 60 F.(2d) 562, 563, 1932 A.M.C. 954.

Similarly, in *The Carso* (EDNY) 1933 A.M.C. 1357, the court referred with approval to the decision of the court in *The Caledonier, supra,* on this point and went on to say:

> "Moreover, there must be a reasonable procedure in such matters, and the rule which would be observed where loss or injury to 10 horses was involved, would not apply to 572 cases of cheese, the marketability of which would be determined by group rather than unit sale."

The Carso (EDNY) 1933 A.M.C. 1357, 1359, Aff'd. 69 F.(2d) 824, 1934 A.M.C. 354; Cert. den. 292 U.S. 647, 78 L. Ed. 1497, 1934 A.M.C. 828.

In answer to Appellant's argument that lack of salvage value was not proved we call attention to the testimony of witness Ferreira who stated:

> "It was impossible to sell the flour * * *" (Aps. 103)

and the testimony of witness Herold, who stated:

> "We have never done so [sold damaged flour], and I believe that this is prohibited by law. We have never sold any damaged flour." * * * (Aps. 119) (Portion in brackets added for clarity)
>
> "I understand this question to refer to the flour actually damaged by water; if so, I believe it is quite unsaleable. I understand that *it is always thrown away.*" (Aps. 119) (Italics added for emphasis)

And again the same witness stated:

> "No value was realized from the damaged portion." (Aps. 126)

In *The Rosalia* (SDNY) 1931 A.M.C. 886, a similar contention as to determination of extent of loss to bales of tobacco damaged by water was considered. The court said:

> "I am not impressed by the argument that the libelant should have sold the damaged tobacco at auction to determine the loss. There is little doubt that such a procedure would have greatly increased the damages which the libelant was bound to mitigate. The general method adopted of seeking to discover the portion of the tobacco which was actually damaged and to calculate the loss in that way is one which must commend itself. A businesslike attempt to hold a fair appraisal by competent men was made, but the claimant refused to take part or even attend. It is true that the damage to the New York bales was found by an estimate based upon the proportion of the volume of each bale that appeared on examination to be damaged, but this was done by trained men who had expert knowledge."
>
> *The Rosalia* (SDNY) 1931 A.M.C. 886.

The above ruling was approved and affirmed by the Court of Appeals, Second Circuit in 264 Fed. 285.

The determination of nature and extent of damage to a shipment of cocoa beans by the same process as used here was approved by the Court of Appeals, Second Circuit in *The Asturias, supra,* a 1943 decision.

Having been given an opportunity to inspect and

check the damaged flour by Appellee's letter of March 2, 1946 (Aps. 64), which opportunity Appellant declined, it would hardly seem appropriate for Appellant to now argue that the opinion of its Seattle witness, Mr. Gow, who never saw the damaged flour, should be substituted for the testimony of two reliable witnesses (Dr. Barreto and Mr. Ramos) who actually saw and calculated the loss on the flour at Rio de Janeiro.

E. EVIDENCE OF MARKET VALUE

Appellant contends that there was insufficient proof of a sound market value per bag of flour at destination of 126 cruzeiros, Brazilian funds, which at the then prevailing rate of foreign exchange would have been $6.62 U. S. per bag (Br. 46).

Appellant's argument is based on the contention that witness Herold testified to a value per bag of 137 cruzeiros but that the witness failed to produce the record or government price control list upon which his statement of selling price was based (Br. 53; Aps. 121, 126, 135).

The complete answer to this claim of error may be found in the statement of Mr. Wakefield, proctor for Appellant, made in open court, and appearing in the printed Apostles, as follows:

> "In justice to my client I can't say that I will admit it was 137 cruzeiros, *I will admit it*

was 126 *cruzeiros.*" (Aps. 132) (Italics added for emphasis)

Proctors for Appellant have estopped themselves from claiming any failure of proof of sound market value by the above statement made during trial in open court.

On the basis of the above statement, Appellee's proctors limited the value per bag in the Findings of Fact and in calculating the amount recoverable in the Decree to 126 cruzeiros per bag (Aps. 29, 32). This was done at the request of the trial court to have the detail as to the amount of damage in U. S. dollars computed by proctors (Aps. 357-8). The value of 126 cruzeiros per bag had previously been stated by Appellee in one of its answers to Appellant's interrogatories before trial and before the deposition of witness Herold had been taken at Rio de Janerio (Aps. 17-18).

III.

ARGUMENT IN SUPPORT OF THE DECREE

Sufficient detail as to salient facts and testimony in support of the Decree has been heretofore set out by Appellee in answer to argument of Appellant.

Having proved delivery of the flour to the carrier in good order, receipt of the flour at destination in damaged condition and having introduced reliable testimony of qualified experts that the damage was

due to salt water contamination to the extent of at least 35% of the 3087 bags of damaged flour, we submit that Appellee was entitled to the decree entered by the trial court, since Appellant failed to prove the cause of the damage to be within any of the exceptions of the Carriage of Goods by Sea Act or the bill of lading contract.

In a very recent cargo damage case tried before the same District Judge as the present case and appealed to this court, *Apex Fish Co. v. U. S. A.* (CA, 9) 177 F.(2d) 364, 1949 A.M.C. 1704, this court said:

> "And since we hold that Apex successfully established such good order and condition at the time of loading, the doctrine of *Schnell v. The Vallescura,* 293 U.S. 296, 1934 A.M.C. 1573 at page 1577, applies:
>
> " 'If he (the carrier) delivers a cargo damaged by causes unknown or unexplained which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of liability. It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage.' *The Medea* (9 Cir.) 179 Fed. 781. This burden was not sustained."
>
> *Apex Fish Co. v. U. S. A.* (CA, 9) 177 F. (2d) 364, 1949 A.M.C. 1704, 1710.

IV.

CONCLUSION

We submit that the lower court's findings as to receipt by the carrier in good order and delivery at destination in bad order with salt water damage are amply supported by the evidence. Furthermore we submit that the Appellant has failed to prove any cause for the salt water damage which would come within the exceptions or exemptions of the Carriage of Goods by Sea Act or the bill of lading. Lastly, we submit that the damages allowed by the decree in the sum of $6,774.42 U. S. funds have been adequately proved or are admitted and agreed to by Appellant.

We, therefore, submit that the decree of the trial court should be affirmed.

Respectfully submitted,

LANE SUMMERS,

CHARLES B. HOWARD,

SUMMERS, BUCEY & HOWARD,

Proctors for Appellee.